No. 11758.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Estate of Joseph H. Heidt, Deceased; Louise Seeley, Executive,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

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Opinion Below.

The facts as found by the Tax Court, and the opinions of the majority of the Tax Court and the dissent, are set out in full in the Record [pp. 15 to 33, incl.] and the attention of the Honorable Court is respectfully directed thereto.

Jurisdiction.

This is a review of a decision of the Tax Court of the United States involving federal estate taxes. The federal estate tax return was filed by petitioner, Louise Seeley [Record p. 159] with the Collector of Internal Revenue for the Sixth District of California on the 14th day of June, 1943 [Record p. 116].

The jurisdiction of the Tax Court of the United States below is based upon Section 871 of the Internal Revenue

Code. The petition to the Tax Court was filed with said Court on the 14th day of August, 1944 [Record p. 2], within the ninety day period allowed by Section 871 of the Internal Revenue Code after the mailing of the notice of deficiency on the 19th day of May, 1944 [Record p. 9]. Sections 1141 and 1142 of the Internal Revenue Code provide for the jurisdiction of the United States Circuit Court of Appeals and subsection 1141(b)(1) provides that this Honorable Court may review a decision of said Tax Court by reason of the fact that the Collector of Internal Revenue for the Sixth District of California is located in the Ninth Circuit. No stipulation designating any other Circuit or designating the United States Court of Appeals for the District of Columbia has been entered into by or between the Commissioner of Internal Revenue and the taxpayer.

Questions Presented.

1. Whether joint tenancy property purchased by husband and wife from vested community funds or from the proceeds of the sale of vested community property can be considered in the determination of the gross estate of decedent as having belonged, half to the surviving spouse and half to the deceased spouse, and never to have been received by the former from the decedent for less than an adequate and full consideration in money or money's worth.

2. Conceding for purposes of argument that the Tax Court correctly interpreted Internal Revenue Code, Section 811(e), whether petitioner had made sufficient showing that all or a portion of each item had come from her separate property or had originally been community prop-

erty acquired as a result of her personal efforts and had not been received or acquired by her from decedent.

3. Whether the Statute of Limitations bars assessment against the petitioner transferee.

4. Whether notice of deficiency was properly given or addressed.

Statutes and Regulations Involved.

Internal Revenue Code:

Sec. 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(e) Joint and Community Interests—

(1) Joint interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such prop-

erty was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) Community Interests—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Treasury Regulations 105:

Section 81.22 prior to T. D. 5239 C. B. 1943, P. 1085 provided:

"The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited or acquired in by gift, bequest, device, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common."

Sec. 81.23 prior to T. D. 5239 C. B. 1943, P. 1085 provided in part:

"Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate."

Sec. 81.22 as amended by T. D. 5239 C. B. 1943, P. 1085 (includes Sec. 81.22 as above). A portion of the added part is as follows:

> "Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate . . .
>
> . . . For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of the spouse and to the identification required, see section 81.23."

Statement of the Case.

Joseph H. Heidt died a resident of North Ridge, California, on November 22, 1942, at the age of ninety nine years and eleven days. The petitioner, Louise Seeley, formerly Louise Heidt, is his widow and since his death has remarried.

The said Louise Seeley duly filed the Federal Estate Tax Return (Form 706) on June 14, 1943, with the Collector of Internal Revenue for the Sixth District of California. The petitioner, the said Louise Seeley, as the widow of said decedent, is surviving joint tenant in the eight items involved in this controversy.

Respondent determined a deficiency, in estate tax against petitioner, in the sum of Sixteen Thousand Four Hundred Thirty Five and 1/100 ($16,435.01) Dollars. This deficiency arose because respondent asserted that petitioner, in the gross estate of said decedent, should have included the full value of the aforesaid eight items of property held in joint tenancy instead of including only one-half of their value, as was done in the said Federal estate tax return.

Petitioner filed an appeal with the Tax Court of the United States.

The case was tried at Los Angeles, California, on June 21, 1946 before the Honorable Eugene Black, Judge of the Tax Court of the United States. The case was submitted on documentary evidence and oral testimony and briefs were filed by both parties. Under date of May 6, 1947, the Tax Court of the United States, by Judge Harlan, who did not hear the witnesses, promulgated its

Findings of Fact and Opinion after a review by the full Court of said opinion. Judge Murdock, in an opinion, dissented from the above decision, Judges Van Fossan and Leech concurring in the dissent. On May 6, 1947, the same day, the Tax Court of the United States entered its decision that there was a deficiency in estate Tax due from petitioner, in the amount of Sixteen Thousand Four Hundred Thirty Five and 1/100 ($16,435.01) Dollars. Said decision is reported as 8 Tax Court No. 111. The evidence presented before the Tax Court consisted of the oral testimony of the petitioner, Louise Seeley, formerly Louise Heidt, widow of the decedent, and Ingall W. Bull, attorney for decedent and petitioner during the greater part of their married life. Judge Bull became attorney for them in approximately the year 1906 and continued as their attorney until he became a Judge of the Superior Court in Los Angeles County. Documentary evidence included the Federal Estate Tax Return, a Deed from the parents of petitioner to petitioner [Petitioner's Exhibit 2] and certain Deeds read into the record by counsel for petitioner [Record pp. 105 to 109, incl.]. The Federal Estate Tax Return was admitted as Petitioner's and Respondent's Joint Exhibit 1-A, and aside from the joint introduction of this exhibit Respondent offered no evidence, oral or documentary, whatever.

During the whole of their marriage, a period of fifty years, decedent and petitioner were residents of California, a community property state, and all of the said items

of property in controversy were acquired since the time of their marriage and all of said items of property were acquired after July 29, 1927, and therefore were "new type vested" community property.

The Court found that at the time of the marriage of decedent in 1893, decedent owned no real estate or personal property other than his personal effects, while petitioner had approximately $1500.00 in money on hand [Record, pp. 16 to 18, incl.]. Petitioner gave decedent $1000.00 to start in the produce business. This business was very successful, although due to market fluctuations decedent failed three times during his business career but never went into bankruptcy. Shortly after their marriage petitioner's parents gave her as a wedding present a Deed to a house and lot in Colton, California. This Colton house was traded for a store at Angel's Flight on South Broadway in Los Angeles and this store was sold and with part of the proceeds petitioner bought a lot in Boyle Heights upon which she built a four room cottage. In the construction of this cottage she received a gift from her father of $400.00 and $800.00 from her mother. Petitioner in this way entered into the real estate business after her marriage and was very successful in it. Part of the time she had a real estate license but most of the time she did not. She bought and sold various houses, hotels and apartments and rented and managed them and continued her real estate operations during the whole of her marriage.

At the death of decedent there were eight items of property held jointly by decedent and the surviving spouse, petitioner here. These eight items were reported under Schedule E of the Federal Estate Tax Return (with the exception of Item 5 which was excluded with the notation that "Decedent furnished nothing toward the acquisition of this item") and were included in the gross estate at one-half their value, petitioner claiming the remaining one-half interest therein [Record p. 18]. The Court made specific findings as to each of the eight items [Record pp. 19 to 21, incl.] The Court found that during their entire married life decedent supported his wife and paid all of their living expenses from his earnings [Record p. 17].

Statement of Points to Be Urged.

1. The Court should have held, as a matter of law, that petitioner showed that the source of all items was community property or the separate property of petitioner, that all of said community property was "new type" vested community property and that therefore petitioner had contributed at least one-half to each item.

2. The Court should have held that even though community property transferred into joint tenancy after October 21, 1942, might have to meet the tests of both Sections 811 (e) (1) and 811 (e) (2) of the Internal Revenue Code or be included at full value in the gross estate of decedent, that as all transfers herein were made before said date that such sections could have no retroactive effect and could not apply to the instant situation.

3. The Court should have held that as Section 81.22 of Treasury Regulations 105 was not amended until after the death of decedent, whatever force such amendment may have in supplementing and implementing the Internal Revenue Code does not apply to the instant case.

4. That petitioner met the burden of showing that at least one-half of items one, three, and six came from or was attributable to property to which the petitioner took title in her own name in writing, that by California law property taken thus is presumed separate and the burden of proof was thus met, there being no contrary evidence.

5. That petitioner did not, as a matter of law, fail to show that the items of real property were acquired as a result of petitioner's activities in the real estate business or from her separate property; that the bonds (item eight) were a gift to petitioner; and that at least one-half of the bank accounts (items six and seven) were funds acquired by petitioner from managing and dealing in real estate or were her separate property.

6. The Tax Court should have, even interpreting the law as it did, made an allocation in the case of items one, three, and six as the proportions attributable to petitioner were easy to identify and mathematical exactness is not a *sine qua non*.

7. That the Statute of Limitations bars assessment against petitioner transferre.

8. That the notice of deficiency was improperly given and addressed.

ARGUMENT.

Summary of Argument.

Petitioner showed conclusively that the consideration for all of the items held in joint tenancy came from the separate property of the surviving spouse or from community property. It is the contention of the petitioner that this showing is sufficient, under California law as it has existed since July 29, 1927, to show that the wife contributed at least one-half of the consideration for the jointly held property. Sections 811 (e) (1) and 811 (e) (2) of the Internal Revenue Code so provide, and it is only because of the issuance of a Treasury Regulation after the death of decedent, which in effect adds to the above cited sections, that any question as to the contributions of the survivor arises. It is the contention of petitioner that the regulations as amended are contrary to law, and that even if construed to be a valid supplementing and implementing of the Internal Revenue Code, that as the regulations were not amended until after the death of decedent, they cannot apply here.

Petitioner further contends that even conceding the validity and applicability of the Treasury Regulations that petitioner made sufficient showing that the real properties were acquired as a result of the personal efforts of petitioner in buying and selling, and in renting and managing real property and in erecting buildings thereon. The bank accounts were depositaries wherein the proceeds of the efforts of petitioner were deposited and constituted

a revolving fund which petitioner used for further real estate ventures.

In any event as mathematical certainty is not required in order that some allocation may be made to petitioner for the property attributable to her efforts, the Court should have made such allocation based on the findings it made, instead of refusing to make any allocation whatever.

Three years from the date of filing the return are allowed for assessing a deficiency against an estate and a further year thereafter to assess against a transferee or fiduciary. This period has passed without assessment against Louise Seeley, formerly Louise Heidt, the transferee herein.

The notice of deficiency was improperly given and addressed in that Louise Heidt was never executrix of the estate of Joseph H. Heidt, deceased, that notice given to her in such capacity was improper and void.

POINT I.

The Use of Community Property to Purchase Property, the Title to Which Is Taken in Joint Tenancy, Is the Use of Property Which Belonged One-half to Each Spouse and Which Never Was Acquired by the One From the Other for Less Than an Adequate and Full Consideration in Money or Money's Worth.

Decedent Joseph H. Heidt and petitioner resided within the State of California at all times from the time of their marriage in 1893 until the death of decedent on November 22, 1942 [Record pp. 115, 116 and 37]. Section 161a of the Civil Code of the State of California provides:

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Section 172 and Section 172a of the Civil Code. This section shall be construed as defining the respective interest and rights of husband and wife in the community property."

In construing this section the case of *Cooke v. Cooke* (1944), 65 Cal. App. (2d) 260, 150 P. (2d) 514, said at pp. 265-266:

> ". . . The wife had a vested community interest in a portion of the policy which could not be taken from her without her consent." (Citing cases.) "It should follow that plaintiff had a vested interest in that portion of the insurance purchased by community funds and that this interest was not 'obtained from or through the other during the

> marriage and in consideration or by reason thereof' but by purchase from community funds . . . that interest vested under the California statute and not through any gift from Stephen."

All of the items of property were acquired after July 29, 1927. Item five was acquired about 1932, or perhaps as late as 1936 [Record pp. 64 and 135]; the hotel building for which item five was reecived as payment was built before 1927 [Record pp. 46 and 132]. Item one was acquired in 1940 [Record p. 88]; item two some time between 1932 and 1936 [Record pp. 62 and 91]; item three in 1927 or 1928 [Record p. 91]; item four was purchased in 1939—petitioner testified that a ranch purchased in 1938 [Record p. 52] was kept approximately two years and then the El Camino property was purchased, decedent and petitioner lived there about a year [Record p. 53] and then purchased a ranch in San Fernando Valley [Record p. 54] (item one); item eight was acquired in 1941 [Record p. 65]; and items six and seven contained moneys received subsequent to 1927.

In the case of *Britton v. Hammell* (1935), 4 Cal. (2d) 690, 52 P. (2d) 221, where the husband made a deed of gift of community property, and the wife sued during the marriage to avoid the gift, the Court held that the gift was *void* and that the entire property should be restored to the community. The Court said (p. 693):

> "Enough has been said to show clearly that the full measure of protection of the wife's rights during the existence of the community can only be

gained by restoring the entire property to the community. This being so, the prior cases limiting recovery to one-half are not inconsistent, because they all hold, in substance, that the wife's rights after death of the husband are fully protected by that limited recovery."

It is submitted that by any criteria of defiinition the share of the wife *originally belonged* to her. If such share is used in the purchase of joint tenancy property it meets the requirement of the Internal Revenue Code, Section 811 (e) (1) requiring the contribution of the survivor to be shown, and requiring that the contribution have originally belonged to the survivor and not have been acquired by such survivor for less than an adequate and full consideration in money or money's worth. As the wife's share never belonged to the decedent it could never have been acquired from him. It originally belonged to petitioner and has always belonged to her.

The Tax Court of the United States said in *Estate of Vandenhoeck v. Commissioner* (1944), 4 T. C. 125, 137:

> "In our judgment the same result would obtain if we consider that the stock was owned and held by petitioner and the decedent as joint tenants, as contended by the respondent. Since it was purchased with community funds one-half the consideration was furnished by petitioner; therefore, only one-half of the value thereof is includible in gross estate under Section 811 (e), *supra*."

POINT II.

If Internal Revenue Code, Section 811 (e) (2), Is to Be Construed as a Gloss on Section 811 (e) (1), Such Operation Must Be Interpreted as Prospective, Rather Than Retrospective, in the Absence of a Clear Directive to the Contrary.

As all transfers herein made were made before the effective date of Section 811 (e) (2) of the Internal Revenue Code on October 21, 1942, the section that governs how the items of property are to be treated is Section 811 (e) (1), not Section 811 (e) (2). None of the items were community property on October 21, 1942, but had been, a long time previously, transferred into joint tenancy. In California a husband and wife can hold property in joint tenancy, in community or as tenants in common (Section 161, Civil Code). The interests of husband and wife in joint tenancy property are their separate property. *Siberell v. Siberell* (1932), 214 Cal. 767, 7 P. (2d) 1003. Section 811 (e) (2) applies to community property; these items had lost any community property characteristics long before the section was enacted. It is presumed, in the absence of clear and convincing evidence to the contrary, that the section was not intended to reach joint tenancy property that once was community. *Hassett v. Welch* (1938), 303 U. S. 303. Another question would be before the Court if the property was community at the effective date of the act and then a transfer was made to escape the rigor of Section 811 (e) (2).

POINT III.

As Section 81.22 of Treasury Regulations 105 Was Not Amended Until After the Death of Decedent It Does Not Apply to the Instant Case.

In brief, the effect of the amendment of Section 81.22 of Treasury Regulations 105 on March 10, 1943, by T. D. 5239 C. B. 1943, p. 1085, was to require that if community property was used to purchase property title to which was held in joint tenancy by the spouses, that the survivor would have to show that such joint tenancy property would meet the requirement of Internal Revenue Code Section 811 (e) (2) which requires that to exempt one-half of community property from federal estate tax that the survivor must show that he or she actually received such property, or the funds to purchase it, as compensation for personal services actually rendered by the survivor or from separate property of the survivor.

The language of the amended regulations goes far beyond Sections 811 (e) (1) and 811 (e) (2). On their plain language, the former is concerned with joint tenancy property and the latter with community property. Property should have to meet the tests and requirements of the *applicable* section, not of *both* sections, in order to be excluded from the estate of decedent.

If, granting for purposes of argument, that the amended regulation can have the force and effect of statute, it must be remembered that decedent died November 22, 1942, and the amendment to Treasury Regulations 105 did not take place until March 10, 1943, the date of the Cumulative Bulletin containing Treasury Decision 5239, at page 1085.

The rule of *Hassett v. Welch* (1938), 303 U. S. 303, *supra*, would definitely preclude its application to a case where the transfers were made and the decedent died before March 10, 1943.

POINT IV.

At Least One-half of Items One, Three and Six Came From, or Is Attributable to, Property to Which Petitioner Took Title in Her Own Name in Writing. Such Property Is Her Separate Property.

Petitioner proved that Nine Thousand and No/100 ($9,000.00) Dollars of the consideration for the purchase of item one, the North Ridge Ranch, came from the Palm Springs property, title to which was in the name of petitioner [Record pp. 68, 89]. This replaced the money borrowed to make the original payment [Record p. 68]. The rest of the consideration was being paid in installments [Record p. 87]. The rule in California is that property, the downpayment for which is made from the funds of the wife, is separate, and community funds used to pay the balance lose their community character and become separate property of the *wife*.

> *Wedemeyer v. Elmer* (1939), 33 Cal. App. (2d) 336, 91 P. (2d) 642;
>
> *Pacific Mutual Life Insurance Company v. Cleverdon* (1940), 16 Cal. (2d) 788, 108 P. (2d) 405.

Item three consisted of two houses and two lots. Petitioner paid Fifteen Thousand and No/100 ($15,000.00) Dollars for one of them and decedent paid Twelve Thousand ($12,000.00) or Fourteen Thousand ($14,000.00) Dollars for the other [Record pp. 69-70 and 91-92].

Item six, Twenty-one Thousand Nine Hundred Fifty-one and 37/100 ($21,951.37) Dollars on deposit with the Bank of America, consisted of Ten Thousand ($10,-000.00) Dollars that was petitioner's own [Record p. 94]; the remainder came from the rents from apartments and buildings that petitioner managed [Record p. 71].

In each of these two petitioner showed a definite contribution from her separate property that should be apportioned in accordance with the provisions of Internal Revenue Code Section 811 (e) (2), conceding for the sake of argument, that such section has some applicability to the instant case.

POINT V.

At Least One-half of Each Item Was Shown to Be Attributable to Petitioner's Activities in the Real Estate Business Except for Item Eight Which Was Shown to Be a Gift to Petitioner From Decedent.

Item eight, Two Thousand and No/100 ($2,000.00) Dollars in United States Defense Bonds, was a gift from decedent to petitioner [Record pp. 65-66]. The rest of the items were acquired as the result of petitioner's activities in buying and selling real property, in renting and managing such real property and in erecting buildings thereon [Record p. 100]. Item seven contained the rents from such properties [Record pp. 71 and 64]. Similarly for item six [Record p. 71]. Item five, the note secured by a trust deed, was in payment of the purchase price of the Elmo Hotel [Record pp. 71, 63-64]. Decedent handled the sale of the hotel [Record pp. 63-64] but petitioner testified that she built it with the proceeds of her separate property [Record pp. 46-47]. Petitioner, as soon as it was built, rented it to a Japanese [Record p. 47] which accounts for the fact that petitioner was not too well acquainted with its internal arrangements or the rents received for the rooms.

The case of *Richardson v. Helvering* (C. C. A., Dist. Col., 1935), 80 F. (2d) 548, said at p. 551:

> "Admittedly, all the real estate in question was held jointly, and the evidence establishes that this holding was pursuant to an agreement between the parties made long prior to the enactment of any federal estate tax. Likewise the evidence shows that each of the parties contributed in money and services, from time to time, to the accumulation of a fund which was invested in real estate, which in turn was sold and the proceeds invested in other real estate, and so on, year after year, the title always passing to them jointly, and the properties, both in law and equity, belonging to them equally."

The showing is much stronger here where it is clear that the properties were accumulated by petitioner's efforts in the real estate business rather than by the joint efforts of husband and wife in common enterprise.

Berkowitz v. Commissioner (C. C. A. 3rd, 1939), 108 F. (2d) 319, in commenting on the amount of proof required in various situations, said at p. 320:

> "It is true that the old lady's testimony was vague. Whose wouldn't be after forty-three years?"

There the Court went on to reverse the Board of Tax Appeals and held that the share of profits received by the survivor in a jointly carried on grocery business would be money's worth in contributing to the purchase of joint tenancy property. Following and citing these cases is

Estate of Fletcher v. Commissioner (1941), 44 B. T. A. 429. It was held that as a contract between husband and wife to share profits was established, the surviving wife must be held to have contributed equally to the jointly owned property.

The Tax Court in *Estate of Neumann v. Commissioner* (1947), 9 T. C. ...... (No. 146), considered the same problem where the parties were residents of Texas, a community property state. The circumstances are quite similar to the instant one. There the wife ran a boarding house. The Court recognized the contributions of the wife as coming from compensation for her personal services. The property, however. was community property rather than joint tenancy so the only question was as to whether the surviving wife met the test of Internal Revenue Code, Section 811 (e) (2). The Court held that she did in part. It is submitted that if the showing there was sufficient, it is in the instant case.

Similarly in a ruling of the Bureau of Internal Revenue, Office Decision (E. T.) 20, 1947-23-12687, it was indicated that if a wife worked in a store with her husband, that part of the community property accumulated could be shown to have been received by her as compensation for personal services actually rendered or derived originally from such compensation even though no definite salary was ever drawn by either.

POINT VI.

The Tax Court Should Have Allocated Items One, Three and Six Between Petitioner and Decedent, the Finding of the Tax Court Calling for Such Allocation—Mathematical Certainty Is Not Required Before the Court Must Act to Make Such Allocation.

The Tax Court found that definite contributions were made to items one, three and six [Record pp. 19-20]. However, the Court required a higher degree of proof in a community property state than it would have in a common law state. No reason would seem to require such an extra burden to be placed on petitioner. Despite the clear rule of *Siberell v. Siberell* (1932), 214 Cal. 767, 7 P. (2d) 1003, that property held in joint tenancy is the separate property of each spouse, the Tax Court treated it as if it were community property [Record p. 31]. It is submitted that the rule of *Cohan v. Commissioner* (C. C. A. 2nd, 1930), 39 F. (2d) 540, is the better. There, although petitioner was unable to show contributions with mathematical certainty, it was held that this was no reason to deny credit for them altogether. The Court said at pp. 543-544:

> "In the production of his plays Cohan was obliged to be free-handed in entertaining actors, employees, and, as he naively adds, dramatic critics. He had also to travel much, at times with his attorney. These expenses amounted to substantial sums, but he kept no account and probably could not have done so. At the trial before the Board he estimated that he had

spent eleven thousand dollars in this fashion during the first six months of 1921, twenty-two thousand dollars between July first, 1921, and June thirtieth, 1922, and as much for his following fiscal year, fifty-five thousand dollars in all. The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such. We think that the Board was in error as to this and must reconsider the evidence."

POINT VII.

The Statute of Limitations Bars Assessment Against Petitioner as Transferee or Fiduciary.

Internal Revenue Code, Section 874 (a), provides that assessment must be made within three years of the date the return was filed. The return was filed herein on June 14, 1943. Internal Revenue Code, Section 900 (b) (1), provides that one year thereafter is the period of limitation of assessment against a transferee or fiduciary. As there was no probate of the estate [Record p. 83], and as Louise Seeley, formerly Louise Heidt, was never the executrix, the notice of deficiency was improper and it is now too late to attempt to hold petitioner as transferee.

POINT VIII.

The Notice of Deficiency Herein Was Improperly Given and Addressed.

Notice of the deficiency should have been given and addressed to Louise Seeley, formerly Louise Heidt, as transferee. There was no such person as the executrix of the *Estate of Joseph H. Heidt,* as no probate was had [Record p. 83]. Therefore the liability of petitioner, if any, would be as transferee and no assertion of transferee liability was made, as noted above, within four years of June 14, 1943. Section 930 of the Internal Revenue Code provides that "executor" means executor, administrator, or person in actual or constructive possession of any property of the decedent but it does not authorize a deficiency to be asserted against a person in the capacity of executor if such person does not in fact exist. Liability was asserted against petitioner in a fiduciary capacity when it should have been as an individual.

Conclusion.

In conclusion, it is submitted, that the Tax Court erred:

First: In not recognizing that the wife's share of the community property is of equal rank with that of the husband in determining what consideration was contributed to joint tenancy property;

Second: If the Tax Court correctly interpreted the law, it erred in failing to credit petitioner with the clear showing made that the properties were the result of her efforts in the real estate business;

Third: The Tax Court erred in requiring mathematical certainty and exactitude before it would give credence to the proof that petitioner admittedly made of her contributions to items one, three, and six;

Fourth: It is urged that no proper notice was given to petitioner and that the time for assessment against her in her personal capacity has run.

It is therefore submitted that the decision of the Honorable Tax Court below is erroneous and should be reversed by reason of such errors.

Respectfully submitted,

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